MOTION FILED

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In the

Supreme Court of the United States

October Term, 1973

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLAND LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

On Appeal from the United States District Court
for the District of Oregon

MOTION OF WESTERN RAILROAD TRAFFIC ASSOCIATION FOR LEAVE TO APPEAR AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

February 11, 1974

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MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

The following western railroads:

The Atchison, Topeka and Santa Fe Railway Company
Burlington Northern
Chicago & Eastern Illinois Railroad
Chicago & North Western Transportation Company
Chicago, Milwaukee, St. Paul and Pacific R.R.
Chicago, Rock Island and Pacific Railroad Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Green Bay and Western Railroad Company
Illinois Central Gulf Railroad
Illinois Terminal Railroad Co.
The Kansas City Southern Railway Co.
Missouri-Kansas-Texas Railroad Co.
Missouri-Pacific Railroad Co.
Norfolk and Western Railway Co.
St. Louis-San Francisco Railway Co.

St. Louis Southwestern Railway Company
Soo Line Railroad
Southern Pacific Transportation Company
The Texas & Pacific Railway Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad
The Western Pacific Railroad Company
The American Short Line Railroad Association

comprising the Western Railroad Traffic Association, respectfully move for leave to appear as *amicus curiae* and to file the attached brief supporting the jurisdictional statement of the Interstate Commerce Commission. The Commission has granted its consent, but appellees refuse to do so.

Railroad members of Western Railroad Traffic Association carry most of the lumber and wood products which are shipped annually from western mills to consumers in other parts of the country, and they are substantially and adversely affected by the existing severe shortage of boxcars and other freightcars suitable for such traffic. Consequently, they are interested in and concerned by the District Court's decision setting aside an emergency car service order under § 1(15) of the Interstate Commerce Act which would eliminate the practice of shippers to immobilize freightcars by using them as traveling warehouses.

In *Atchison, T. & S.F.R. Co. v. Bd. of Trade* (1973) ___ US ___, 37 L ed 2d 350, this Court noted that

wasteful shipping practices are a significant cause of freightcar shortages, and the record shows that a severe shortage exists in the lumber industry which is substantially contributed to by shipper practices which are the subject of the Commission's order. However, the District Court set it aside on the ground that it was a "rate fixing order," not a "car service order," and was not authorized by § 1(15). The result is to nullify an important action of the Commission, one taken in the public interest to alleviate an increasingly critical shortage of cars. The impact of the Court's decision on the Western Lines is substantial and adverse.

In the attached brief *amicus curiae*, these railroads, through their association, urge the Court to note probable jurisdiction and set the case for oral argument.

Respectfully submitted,

OGLESBY H. YOUNG
Counsel for Western Railroad Traffic Association, *Amicus Curiae*

February 11, 1974

James H. Clarke
Mark S. Dodson
Of Counsel

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Railroads who are members of Western Railroad Traffic Association are interested in the District Court's decision, because it will prolong a freightcar shortage which adversely affects them by limiting the Commission's power to deal with such conditions under § 1(15) of the Interstate Commerce Act, 49 USC § 1(15), and because it deprives the Commission of authority under § 1(15) to increase car utilization in an emergency by regulatory measures which temporarily affect railroad rate charges.

ARGUMENT

The District Court incorrectly limited the commission's emergency power to increase car utilization under § 1(15) of the Interstate Commerce Act by drawing an unsound and unwarranted distinction between "rate orders" and "car service orders."

The District Court did not question the reality or severity of the current freightcar shortage. However, the court construed § 1(15) to deny the Commission power to take necessary steps to increase car utilization, holding that it cannot issue emergency car service orders which have the effect of temporarily suspending tariff provisions. The court's decision severely limits the Commission's ability to deal with boxcar shortages amounting to emergencies, and it is urgent that this Court should review it.

Until now, emergency car service orders have frequently contained provisions designed to increase car utilization by increasing transportation charges.1/ However, the order which the District Court set aside in this

1/ E.g., the Commission has increased demurrage charges, which by reason of their regulatory function are among the "rules, regulations and practices" which are subject to § 1(15). See *Armour & Co. v. Louisiana S. Ry. Co.*, (CA 5 1951) 190 F2d 925 at 927, cert den (1952) 342 US 913. Such a demurrage order has all of the characteristics of a rate order which

case does not change any tariff rate; instead it seeks to increase car utilization by declaring when an existing rate shall apply. Whether or not this is among the "rules, regulations and practices" referred to in § 1(15) is a substantial question which cannot be determined by a semantic distinction between "rate orders" and "car service orders."2/

The important question in this case is not whether the Commission has authority to regulate rates, but whether under § 1(15) it can issue an emergency order affecting rates without notice or hearing. That question has never been considered by the Court, although recent decisions forcefully suggest that it was wrongly decided by the court below.

In *United States v. Allegheny-Ludlum Steel Corp.*, (1972) 406 US 742 the Court held that § 1(14)(a) of the Act does not require an "adjudicatory" hearing, and in a concurring opinion in *Atchison, T. & S.F.R . v. Bd.*

are referred to by the District Court: It suspends tariff provisions, it penalizes the shipper, and it establishes a fixed time limit beyond which charges become regulatory rather than compensatory.

2/ In *Iverson v. United States*, (D DC 1946) 63 F Supp 1000 at 1006, aff'd (1946) 327 US 767 Judge Prettyman concluded that regulatory orders affecting charges are still "rules" under § 1(15): "* * * If a published rule or regulation affects or determines a charge, it is nevertheless a rule or regulation."

of Trade, (1973) ____ US ____, 37 L Ed 2d 350 at 374, three members of the Court approved on attempt by the Commission to increase the efficient utilization of freightcars by increasing accessorial charges as a "promising effort to solve a critical problem."[3/]

In sharp contrast to this increasing emphasis on the regulatory function of rate charges and the reduced scope of adjudicatory hearings, the court below nullified a regulatory order which affected rates in dealing with an emergency under § 1(15), even though that section expressly authorizes the Commission to proceed in such cases without notice or hearing. It did not inquire if this was a proper regulation to meet an emergency, or if, instead, it was a disguised attempt to fix compensation without an ajudicatory hearing; it simply ignored the distinction between the two. The issue before this Court is whether that question is controlled by abstract concepts of "car service orders" and "rate orders," or whether the Commission has authority in an emergency to improve car service by reasonable regulations which it deems appropriate to the situation. This is a substan-

3/ In *United States v. Florida East Coast R. Co.*, (1973) 410 US 224 at 232 the Court noted increasing congressional and judicial criticism of the Commission for "conducting too many hearings and taking too little action." In *Peoria Ry. Co. v. United States*, (1923) 263 US 528 at 533-34, n.7 the Court reviewed the legislative history of the Esch Car Service Act. It is clear from that discussion that Congress did not intend to disable the Commission from dealing effectively with boxcar emergencies by requiring extensive judicial procedures.

tial question, one badly confused by the decision below, which this Court should answer.[4/]

CONCLUSION

This is an important case in which the District Court severely limited the Commission's authority to issue emergency car service orders under § 1(15) of the Act, and its decision will prolong and intensify the current boxcar shortage. The Court should note probable jurisdiction and set the case for oral argument.

Respectfully submitted,

OGLESBY H. YOUNG
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4/ In substance, the decision below is also inconsistent with decisions of other courts, which have allowed the Commission reasonable scope to interpret its emergency powers *(United States v. Southern Railway*, (ED Va 1969) 306 F Supp 108 at 112) and recognize that due process does not require an adjudicatory hearing in a broad rate making context *(Virgin Islands Hotel Ass'n. v. Virgin Islands W. & P. Auth.*, (CA 3 1973) 476 F 2d 1263).